

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Time Warner Entertainment-Advance/Newhouse Partnership	)	
	)	
Time Warner Entertainment Company, L.P.	)	CSR 5796-E
	)	
Cablevision Industries of Central Florida	)	
	)	
Petition for Determination of Effective Competition in Various Florida Communities	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 15, 2002**

**Released: November 19, 2002**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Time Warner Entertainment-Advance/Newhouse Partnership, Time Warner Entertainment Company, L.P., and Cablevision Industries of Central Florida ("Time Warner") has filed with the Commission a petition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act") and Sections 76.7(a)(1) and 76.905(b)(1) of the Commission's rules for a determination of effective competition in thirteen communities in Florida (the "Communities").<sup>1</sup> Time Warner alleges that its cable systems serving the Communities are subject to effective competition and therefore exempt from cable rate regulation. Time Warner alleges that its cable systems serving twelve Communities are subject to effective competition and therefore exempt from cable rate regulation because of competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and EchoStar Communications Corporation ("EchoStar"). In addition to the DBS providers, Comcast Corporation ("Comcast") is a competing cable provider in two of the Communities. Time Warner also claims the presence of effective competition in the Flagler County Franchise Area because fewer than thirty percent of the households subscribe to the cable services of its cable system. No opposition to the petition was filed.

**II. DISCUSSION**

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>2</sup> as that term is defined by Section 76.905 of the Commission's rules.<sup>3</sup>

<sup>1</sup>See 47 U.S.C. § 543(a)(1); 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(1). Bushnell and Volusia County (FL0015, FL0043, FL0059, FL0200, FL0216 and FL0518) are certified to regulate basic cable rates.

<sup>2</sup>47 C.F.R. § 76.906.

The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>4</sup> Based on the record presented in this proceeding, Time Warner has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent (15 percent) of the households in the franchise area.<sup>5</sup> In addition, Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if “fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system.”<sup>6</sup>

### **The Competing Provider Test**

4. Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.<sup>7</sup> Time Warner has provided evidence of the advertising of DBS service in the news media serving the twelve Communities for which a competing provider determination is requested.<sup>8</sup> With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.<sup>9</sup> We find that Time Warner has demonstrated that the communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the twelve Communities. Time Warner also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and EchoStar.<sup>10</sup> Therefore, the first prong of the competing provider test is satisfied for the twelve Communities served by Time Warner's franchises.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise

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<sup>3</sup>47 C.F.R. § 76.905.

<sup>4</sup>See 47 C.F.R. §§ 76.906 & 907.

<sup>5</sup>47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>6</sup>47 U.S.C. § 543(l)(1)(A).

<sup>7</sup>See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>8</sup>See Time Warner Petition at 3-6 and Exhibit C.

<sup>9</sup>See 47 C.F.R. § 76.905(g). *See also* Time Warner Petition at 6-7 and Exhibits D, E, and F.

<sup>10</sup>See Time Warner Petition at 5-6.

area. Time Warner sought to determine the competing provider penetration in twelve of its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code plus four basis.<sup>11</sup> Time Warner asserts that it is the largest MVPD in eight of the Communities because Time Warner's subscribership exceeds the aggregate DBS subscribership for those franchise areas.<sup>12</sup> Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data,<sup>13</sup> we find that Time Warner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in these eight Communities. Therefore, the second prong of the competing provider test is satisfied as to these twelve Communities. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable systems serving the eight Communities set forth on Attachment A are subject to effective competition.

6. As to three other communities, Lake County, Marion County, and Sumter County, Time Warner is unable to determine the largest MVPD because the number of DBS subscribers for DirecTV and EchoStar provided by SkyTrends are aggregated and exceed the number of Time Warner subscribers. Nevertheless, we are able to conclude that the second prong is met by analyzing the data submitted for both Time Warner and the DBS providers. If the subscriber penetration for both Time Warner and the aggregate DBS information each exceed 15 percent in the franchise area, the second prong of the competing provider test is satisfied. In Lake County, assuming Time Warner is the largest MVPD, the combined DBS/Comcast penetration rate is 35 percent.<sup>14</sup> Conversely, assuming that one of the DBS providers is the largest MVPD in Lake County, the combined subscribership of Time Warner and Comcast, even without accounting for the remaining DBS provider, is 22 percent.<sup>15</sup> In Marion County, the combined DBS penetration rate is 25 percent and Time Warner's penetration rate is 20 percent.<sup>16</sup> In Sumter County, the combined DBS penetration rate is 22 percent and Time Warner's penetration rate is 20 percent.<sup>17</sup> Accordingly, we find that Time Warner has demonstrated that the number of households subscribing to programming services offered by MVPDs other than the largest MVPD, exceeds 15 percent of the households in its Lake County, Marion County, and Sumter County franchise areas.

7. In the City of DeBary, Comcast is the largest MVPD with 3,364 subscribers.<sup>18</sup> Time Warner and the DBS providers have a combined penetration rate of 28 percent.<sup>19</sup> Based on this record, we find that Time Warner has demonstrated that the number of households subscribing to programming services offered by MVPDs other than the largest MVPD, exceeds 15 percent of the households in its

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<sup>11</sup> *Id.* at 8 - 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* and Exhibit B.

<sup>14</sup> *Id.* at 10 - 11 and Exhibits G, H, L and M. (17,562 combined DBS/Comcast subscribers ÷ 49,699 Lake County households = 35%).

<sup>15</sup> *Id.* (10,813 combined Time Warner/Comcast subscribers ÷ 49,699 Lake county households = 21.7%).

<sup>16</sup> *Id.* (21,031 DBS subscribers ÷ 85,129 Marion County households = 24.7%; 17, 221 Time Warner subscribers ÷ 85,129 Marion County households = 20.2%).

<sup>17</sup> *Id.* (3,789 DBS subscribers ÷ 17,476 Sumter County households = 21.7%; 3,441 Time Warner subscribers ÷ 17,476 Sumter County households = 19.6%).

<sup>18</sup> *Id.* at 9-10 and Exhibit J.

<sup>19</sup> *Id.* at 9-10 and Exhibit K. (1,808 combined Time Warner/DBS subscribers ÷ 6,538 DeBary households = 27.6%).

City of DeBary franchise area.

### **The Low Penetration Test**

8. Time Warner submits sufficient evidence regarding household and subscriber data, which demonstrate that its Flagler County, Florida cable system serves less than 30 percent of households in the franchise area. Time Warner provided 2000 Census Bureau household data that indicates that there are 17,651<sup>20</sup> households in its Flagler County franchise area.<sup>21</sup> Time Warner also provides the count of Time Warner subscribers in the franchise area, which it used to calculate a subscriber-to-household penetration rate. The data establishes that Time Warner has a total of 627 subscribers in its Flagler County franchise area resulting in a penetration rate of less than one percent.<sup>22</sup> Based on this record, we conclude that Time Warner has demonstrated that its Flagler County cable system meets the requirements of low penetration effective competition under our rules, and we grant its petition.

### **III. ORDERING CLAUSES**

9. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Time Warner Entertainment-Advance/Newhouse Partnership, Time Warner Entertainment Company, L.P., and Cablevision Industries of Central Florida **IS GRANTED**.

10. **IT IS FURTHER ORDERED** that the certifications of Bushnell and Volusia County to regulate basic cable rates **ARE REVOKED**.

11. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>23</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division, Media Bureau

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<sup>20</sup>The figure reflects the final unincorporated household total. See Time Warner Petition at Exhibit B.

<sup>21</sup>*Id.* at 3 and Exhibits A and B.

<sup>22</sup>*Id.* (627 Time Warner subscribers ÷ 17,651 Flagler County households = 0.036%).

<sup>23</sup>47 C.F.R. § 0.283.

## Attachment A

## CSR-5796-E

<b>Communities</b>	<b>CUIDS</b>	<b>CPR*</b>	<b>2000 Census Households<sup>+</sup></b>	<b>Estimated DBS Subscribers<sup>+</sup></b>	<b>Time Warner Subscribers<sup>+</sup></b>
Bushnell	FL0585	32.0	830	266	775
Deltona	FL1250	17.6	24,896	4,370	16,631
Flagler Beach	FL0254	19.3	2,483	489	2,087
Mascotte	FL0267	25.4	803	204	504
Oak Hill	FL0736	18.8	549	103	303
Osceola County	FL0201	26.2	36,140	9,481	15,692
Volusia County	FL0015	20.2	43,354	8,752	29,715
Wildwood	FL0835	15.6	1,640	256	1,522

\*CPR = Percent of competitive DBS penetration rate.

<sup>+</sup>See Petition at 9 and Exhibits B, H, and I.